Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Notice of Inquiry Concerning a Review	)	
Of the Equal Access and Nondiscrimination	)	CC Docket No. 02-39
Obligations Applicable to Local Exchange	)	
Carriers	)	
	)	
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COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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INTRODUCTION AND SUMMARY

The United States Telecom Association (USTelecom)[1] urges the Federal Communications Commission to take immediate action to end the long outmoded Modification of Final Judgment (MFJ)[2] equal access and nondiscrimination obligations that apply only to certain local exchange carriers (LECs) by dint of section 251(g) of the Telecommunications Act of 1996 (1996 Act). These MFJ requirements that section 251(g) continues were put in place as part of the break up of AT&T in the early 1980s to ensure that consumers learned that they had a choice of long distance providers and that long distance providers would have access to consumers. The Commission subsequently extended these MFJ requirements to independent telephone companies. The

[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks. USTelecom submits these comments in response to the *Public Notice Asking Parties To Refresh The Record Regarding Review Of Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers,* CC Docket No. 02-39 (rel. March 7, 2007).

[2] *See infra* n. 6 and n. 7.

requirements themselves were then subject to years of litigation before the MFJ court, resulting in intricate MFJ equal access lore contained in dozens of orders elaborating the requirements. These requirements have been long superseded by changes in the market—there was no meaningful wireless service, broadband, e-mail or VoIP at the time of the MFJ decree—and by the broad set of requirements in the 1996 Act and FCC regulations that effectively render the MFJ equal access regime redundant. However, section 251(g) continues the application of the long outmoded MFJ equal access regime until the Commission takes action. Until the Commission does so, these MFJ requirements will continue to raise the cost of providing service for the one set of carriers that they apply to, tipping the competitive playing field and harming consumer welfare.

The Commission could eliminate the MFJ equal access and nondiscrimination requirements by issuing an order in its Biennial Review proceeding[3] or by issuing a forbearance order on its own motion. The record in the Biennial Review and in other proceedings, such as the 272 sunset proceeding,[4] is full of evidence demonstrating that these requirements belong to another era, and serve no useful purpose today. Alternatively, the Commission could issue a Notice of Proposed Rulemaking concerning the MFJ requirements. Given the record in this and related dockets, the Notice of Proposed Rulemaking should affirmatively presume that the MFJ equal access and

[3] *Biennial Regulatory Review of Regulations Administered by the Wireline competition Bureau*, WC Docket No. 06-157 (Biennial Review).

[4] *See* Verizon letter from Dee May, Vice President – Federal Regulatory, to the Commission (Feb. 15, 2007) filed in response to *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements* and *2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112 and CC Docket No. 00-175, Further Notice of Proposed Rulemaking (rel. May 19, 2002).

nondiscrimination requirements no longer serve the public interest, and put the burden of proof on any proponent of a particular MFJ requirement to identify the requirement specifically, demonstrate that it does not overlap with any statutory or regulatory requirement already in place under the 1996 Act and the Commission's rules, and explain how that requirement serves the public interest given the vast market changes since the MFJ. In particular, the Commission should tentatively conclude that the MFJ's requirement for affirmatively notifying customers of long distance carrier options does not serve the public interest and should be eliminated.

Today's communications market is one in which competition between stand-alone long distance providers is increasingly displaced by competition among providers of all-distance bundled services. Today, there are more wireless handsets than fixed lines, broadband and VoIP services have exploded, and consumers can swap between fixed, mobile, and VoIP services and the flat-rated or bundled long distance plans available on each platform. Today's world of communications is characterized by rapid deployment of advanced broadband technologies and geography-agnostic facilities and services by multiple competing providers over a variety of technology platforms.[5] In this environment of all-distance calling, the concept of separate local and long distance services has become an anachronism. Yet, the MFJ requirements force traditional LECs, and only those companies, to try to maintain a distinction between local and long distance services by reading scripts that attempt to separate the two services and to randomly name carriers offering stand-alone long distance services. The requirement that local service providers inform new customers of their presubscription interexchange carrier

[5] *See* Verizon Biennial Review Comments (Sept. 1, 2006) at 23.

(IXC) choices by offering to read them a list of long distance providers forces only incumbent LECs (ILECs) to market their services inefficiently and to design inefficiencies into their services. These inefficiencies raise costs and burden the customers of all traditional LECs from the largest to the smallest. For example, small rural carriers waste time and resources regularly printing and posting new randomized lists of long distance providers in order for their customer service representatives to read customers. The purposes of the requirement, which, like that of other equal access and nondiscrimination requirements, were to inform consumers that they had choices in long distance providers and to end the favored position of the legacy AT&T in the long distance market, were fulfilled long ago. After decades of marketing, American consumers know they may choose their long distance providers. Furthermore, no company enjoys a similar position to legacy AT&T in today's communications marketplace, and, in fact, long distance has become a part of the any-distance calling services offered by multiple carriers over multiple platforms. Given this competitive market, the Commission should proceed to eliminate the MFJ equal access regime as quickly as possible.

DISCUSSION

I. The MFJ Equal Access And Non-Discrimination Requirements Are Anachronistic.

The MFJ equal access and nondiscrimination requirements[6] were imposed on ILECs prior to the passage of the 1996 Act, when monopoly providers of local services

[6] We use "MFJ" requirements here to include the equal access and nondiscrimination requirements imposed on AT&T by the MFJ and later extended to GTE and what were called at the time "independent" telephone companies.

were prohibited from offering interexchange services. Knowing that competition would not develop in all markets immediately upon passage of the 1996 Act, Congress left these rules in place through section 251(g),[7] which preserved the MFJ equal access and nondiscrimination requirements until the Commission acted to impose a different regime. Section 251(g) imports the obligations of the MFJ and the GTE antitrust consent decree—both of which were imposed as part of the restructuring of the industry to end the monopolistic position of AT&T in the long distance market. Approved in 1982, the MFJ separated AT&T's local exchange business from its interexchange business and imposed requirements on the newly divested BOCs to ensure that they did not discriminate in favor of their former affiliate, AT&T.[8] The GTE consent decree defined the features of full equal access as:

> (1) dialing parity; (2) rotary dial access; (3) network control signaling; (4) answer supervision; (5) automatic calling number identification; (6) carrier access codes; (7) directory services; (8) testing and maintenance of facilities; (9) provision of information necessary to bill customers; and (10) presubscription.[9]

While the MFJ obligations did not apply to independent ILECs, the Commission adopted this definition of equal access and imposed it on independent ILECs in 1985.[10]

The purpose of the equal access and nondiscrimination provisions of the consent decrees was to ensure that the divested BOCs did not abuse their power to disadvantage

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[7] 47 U.S.C. § 251(g).

[8] *United States v. American Tel. &Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982) (AT&T Consent Decree).

[9] *United States v. GTE Corp.*, 603 F. Supp. 730, 743 n. 55 (D.D.C. 1984) (GTE Consent Decree).

[10] *MTS and WATS Market Structure, Phase III*, Report and Order, 100 F.C.C. 2nd 860 (1985).

competitors of AT&T. They were intended to ensure that "any disparities in interconnection be eliminated so that all interexchange and information service providers [would] be able to compete on an equal basis."[11]

The practice of reading lists of IXCs to customers was first adopted voluntarily by the BOCs who expected customers would be surprised when asked to select a long distance carrier and would not know the name of any long distance carrier other than AT&T. The practice was made mandatory by the decree court in 1983 as a condition of allowing BOCs to continue to route to AT&T calls from customers who had failed to select an IXC.[12] The Commission recognized this practice in its later balloting requirements.[13] Finally, the Commission began requiring service representatives to affirmatively inform their customers of their presubscription options and to read them lists of carriers in 1985 in its order extending equal access to other ILECs.[14] Like the other equal access rules, this requirement that ILECs read new customers names of IXCs available for presubscription may have been reasonable when it was adopted—when

[11] AT&T Consent Decree at 195. *See also* GTE Consent Decree at 735, "By requiring the GTE Operating Companies to terminate their partnership with AT&T, the decree will tend to remove GTE's incentive and ability to favor that company which has frustrated the achievement of a more competitive interexchange market."

[12] *United States v. Western Elec. Co.*, 578 F. supp. 668 676-77 (D.D.C. 1983).

[13] *Investigation of Access and Divestiture Related Tariffs,* 101 F.C.C. 2nd 911 App. B ¶ 22 (1985), stating "New customers are to be handled by the Business Office according to the LEC's new customer presubscription procedures. These procedures should provide new customers with an opportunity to obtain a ballot and make an interexchange carrier selection."; *Investigation of Access and Divestiture Related Tariffs*, 101 F.C.C. 2nd 935 ¶40 (1985), clarifying that mailing a ballot was not required and that orders could be taken over the telephone: "LEC personnel taking the verbal order should provide new customers with the names and, if requested, the telephone numbers of the IXCs and should devise procedures to ensure that the names of IXCs are provided in random order."

[14] *See supra* n. 8.

equal access and presubscription were brand new and customers needed to know that they could choose a long distance provider other than AT&T. Today, however, it is an anachronism.

II. The Commission Should Eliminate Anachronistic Requirements, Including The Requirement That ILECs Offer To Read To Customers A List Of Interexchange Carriers Available For Presubscription.

The world of communications has changed dramatically since adoption of the MFJ's equal access rules. In today's converged telecommunications market, regulatory distinctions between local and long distance services—as well as interstate and intrastate services—are anachronisms. Not only do customers have a choice of local and long distance providers, they have a choice of type of provider. As the Commission notes, consumers can choose from bundled packages of local and long distance services and buckets of minutes offered by incumbent LECs, competitive LECs, wireless carriers, cable companies, over-the-top VoIP, and can choose to communicate via e-mail, instant messaging, and texting. [15] The providers of all of these services face vigorous and growing competition. The Commission has recognized this, concluding, "competition from intermodal competitors is growing quickly, and we expect it to become increasingly significant in the years to come."[16] In the converged telecommunications market, in which companies increasingly integrate and market bundles of diverse communications services, consumers increasingly demand all of their telecommunications services from a

[15] *AT&T Inc. and BellSouth Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order at ¶ 105 (rel. March 26, 2007) (AT&T/BellSouth Merger Order).

[16] *Id*. ¶ 106; *See also Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer Control*, WC Docket No. 05-75 (rel. Nov. 17, 2005) at ¶ 102 (Verizon/MCI Merger Order).

single provider.[17] Younger consumers do not even think in terms of geography—whether they are buying local or long distance service—but in terms of communications, whether it be all-distance voice minutes, unlimited texting, or using a broadband connection for instant messaging and e-mail. Trying to instill in this customer group, or any customer group, an appreciation that they may separately choose another company to handle their voice calling between LATAs in different states (and perhaps a separate choice for voice calls between LATAs within a state) is little more than a waste of their time—a waste of time inflicted on them only by companies that have a wireline heritage that subjects them the MFJ's equal access regime.

The Commission has noted that "the stand-alone wireline long distance market is steadily declining in size relative to the bundled services market."[18] Yet in this market in which there are no dominant long distance carriers capable of exerting market power,[19] BOCs and independent ILECs are still required to comply with rules and regulations designed for an era in which there were. These carriers must comply with the MFJ regime because of section 251(g), which preserves any equal access court order, consent decree, or regulation, order, or policy of the Commission pre-dating the 1996 Act. The restructuring of the industry was completed years ago, and many of the obligations in section 251(g) have been superseded by other statutory provisions of the 1996 Act,

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[17] AT&T/BellSouth Merger Order at ¶ 101; *See also* Verizon/MCI Merger Order at ¶ 96.

[18] *Id.*

[19] *See* USTelecom Comments (June 23, 2003) at 4-8 in response to *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements, 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules*, WC Docket No. 02-112 and CC Docket No. 0-175, Further Notice of Proposed Rulemaking (rel. May 19, 2002), showing that the long distance market is fully competitive and that BOCs and independent ILECs are not dominant in that market.

including nondiscrimination provisions,[20] interconnection requirements,[21] and dialing parity.[22] The Commission should eliminate the MFJ requirements continued under 251(g).

Moreover, the Commission should eliminate any MFJ equal access obligations not specifically and expressly perpetuated by the 1996 Act (other than in section 251(g)), unless it makes an affirmative finding that any other such obligation continues to be necessary in the public interest. The Commission could accomplish this through one of several administrative vehicles—by issuing an order in its Biennial Review proceeding, by issuing a forbearance order on its own motion, or by initiating a rulemaking. If the Commission feels that it must issue a Notice of Proposed Rulemaking before eliminating the MFJ requirements, that Notice of Proposed Rulemaking should include a tentative conclusion that any such requirements will be eliminated unless commenters can point to specific requirements and demonstrate their continued necessity.

In particular, the Commission should eliminate the requirement that ILECs identify and essentially promote the interexchange services of all available IXCs to new customers. Under the MFJ, ILECs must inform new local customers that they can obtain

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[20] *See* 47 U.S.C. 202(a), 272(c) and 272(e). Section 202(a) prohibits common carriers from discriminating against or giving preferences to other carriers; Section 272(c) prohibits BOCs from discriminating in favor of their affiliates and other entities; and Section 272(e) requires BOCs and their affiliates to provide other carriers with facilities, services, and information on the same terms and conditions that they provide to each other.

[21] *See* 47 U.S.C. 201(a) and 251(a). Section 201(a) of the Act requires common carriers to establish physical connections with other carriers, and section 251(a) requires all telecommunications carriers to interconnect with other telecommunications carriers.

[22] Section 251(b)(3) requires all local exchange carriers to provide dialing parity to competing providers of telephone exchange service and telephone toll service.

long distance services separately and must offer to read a list of available long distance providers. This requirement harkens back to an era when customers did not know that they could choose a long distance company other than AT&T. Today's consumers not only know they have a choice of long distance provider, they are moving beyond choosing stand-alone long distance service and purchasing more economical bundled services that have nothing to do with geography. Today's consumers know that they have choices—not just among long distance providers—but among a variety of all-distance services offered by a wide range of intermodal providers. The Commission should, therefore, eliminate the outdated requirement that ILECs offer to read to customers a list of IXCs available for presubscription.

Equal access and nondiscrimination regulations are not imposed on other providers of local exchange services. Cable telephone providers, for example, do not have to inform their customers that they may obtain long distance services from the BOCs. BOCs and independent ILECs should not, therefore, be required to market the long distance services of their competitors. Given today's competitive market, in which stand-alone long distance service is becoming "a fringe market,"[23] there is no reason there should not be parity for BOCs and all other local service providers with respect to inbound scripting requirement. Carriers offering reasonably comparable services should be regulated in the same way. Eliminating unnecessary marketing restrictions on BOCs and independent ILECs, such as those requiring them to read consumers lists of their competitors, would be a big step toward regulatory parity.

[23] *See* AT&T/BellSouth Merger Order at ¶ 97.

III. Anachronistic Regulations Increase Companies' Costs.

The MFJ equal access and nondiscrimination requirements force ILECs to market their services inefficiently by, for example, requiring them to read names of long distance providers to new local customers. Those opposing the elimination of these requirements have argued that these provisions have become incorporated into the day-to-day business practices of ILECs—saying that switches, employees, training programs, billing systems have been designed to meet these requirements.[24] This is irrelevant. It ignores the fact that the time that customer service operations must spend preparing lists of long distance carriers and reading their names to customers is time wasted. Even the smallest companies are affected by these requirements. For example, USTelecom member Blackfoot Communications, a company in Missoula, Montana with under 20,000 access lines, prints and posts a new list of long distance providers regularly for its customer service representatives to read in order to ensure that they name long distance providers in a random order. Providers are wasting time, money, and effort complying with regulatory requirements from another era. These regulations force them to design inefficiencies into their services that ultimately raise costs and detract from the value of service.

CONCLUSION

The Commission should issue an order in the Biennial Review docket or grant forbearance on its own motion to eliminate the MFJ requirements currently preserved by section 251(g). Alternatively, the Commission should issue a Notice of Proposed Rulemaking proposing to eliminate the MFJ equal access regime unless a proponent can

[24] Sprint Comments at 5.

demonstrate that a particular requirement remains in the public interest despite the seismic market shifts since the mid-1980s and despite the comprehensive regulatory scheme put in place under the 1996 Act. The MFJ equal access requirements force BOCs and independent ILECs to market their services inefficiently and do not apply to cable, wireless, or VoIP providers. These requirements do not make sense in today's competitive market in which consumers buy plans bundling local and long distance services at competitive rates from BOCs, other ILECs, wireless carriers, cable providers, and VoIP providers. These requirements are a waste of time and resources both for carriers and no longer serve a useful purpose.

Respectfully submitted,

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